

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>UNITED STATES OF AMERICA</b>	:	
	:	
	:	<b>CRIMINAL ACTION</b>
	:	
<b>v.</b>	:	
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	:	
<b>JOSE ORTIZ</b>	:	<b>No. 99-256</b>
	:	
	:	

**DUBOIS, J.**

**October 26, 2000**

**MEMORANDUM**

**I. INTRODUCTION**

Defendant Jose Ortiz, a/k/a “Chelo,” (“Ortiz” or “defendant”) was charged in two counts of a superseding indictment with conspiracy to distribute and possess with intent to distribute cocaine base (“crack”) and heroin in violation of 21 U.S.C. § 846 (Count One); and with possession with intent to distribute and aiding and abetting possession with intent to distribute cocaine base (“crack”) in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Count Three). On December 20, 1999, after a jury trial, Ortiz was found guilty of those charges. Presently before the Court is Ortiz’s Motion for New Trial pursuant to Federal Rule of Criminal Procedure 33. For the following reasons, the motion for new trial will be denied.

## II. BACKGROUND

Count One of the First Superseding Indictment (“Indictment”) charged Ortiz with conspiracy to distribute and possess with intent to distribute cocaine base (“crack”) and heroin. In describing the manner and means of the conspiracy in the Indictment, the government stated that Ortiz controlled an illegal drug distribution organization on the 3000 block of North Lee Street in Philadelphia, Pennsylvania. The Indictment charges that the conspiracy existed from “at least December 1996 through at least on or about August 12, 1998.” Indictment ¶ 1.

In support of the conspiracy charge, the government offered in evidence a notebook of drug transactions through the testimony of Fermin Diaz-Baez (“Diaz-Baez”<sup>1</sup>). The notebook, Government Exhibit 17 (“G-17”), contains references to an individual named “Chelo,” a name used by Ortiz. Ortiz objected to this evidence on the ground that the evidence was inadmissible under Federal Rules of Evidence 404(b) and 403, and that the entries in the notebook constituted inadmissible hearsay. To resolve concerns about the admissibility of the evidence, the Court conducted a lengthy document voir dire out of the presence of the jury on December 8 and 9, 1999. After hearing the evidence, the Court ruled that G-17 was admissible.

Ortiz’s motion for new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure is based on arguments that: (1) the evidence in the notebook was irrelevant to the charges against him and highly prejudicial; and (2) the entries relating to Chelo in the notebook constituted inadmissible hearsay not covered by any exception to the hearsay rule.

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<sup>1</sup>There is some discrepancy as to the last name of this witness. Ortiz refers to Fermin Diaz-Baez as “Baez-Diaz” throughout this memorandum of law in support of a new trial; the government refers to him as “Diaz-Baez.” For the purposes of this memorandum, this witness will be referred to as “Diaz-Baez,” the name by which he introduced himself at trial. See Tr. at 2 (Dec. 8, 1999).

### III. STANDARD OF REVIEW

Under Rule 33 of the Federal Rules of Criminal Procedure, the Court may grant defendant's motion for a new trial "if required in the interest of justice." Fed. R. Crim. P. 33. "Whether to grant a Rule 33 motion lies within the district court's sound discretion." United States v. Polidoro, 1998 WL 634921, at \*4 (E.D. Pa. Sept. 16, 1998) (citing United States v. Mastro, 570 F. Supp. 1388, 1390 (E.D. Pa. 1983)). In exercising its discretion, the court may grant a motion for a new trial on one of two grounds. First, the court may grant the motion "if, after weighing the evidence, it determines that there has been a miscarriage of justice." Government of the Virgin Islands v. Commissiong \_\_\_, 706 F. Supp. 1172, 1184 (D. V.I. 1989). Second, the court "must grant a new trial if trial error had a substantial influence on the verdict." Id. at 1184; see also Government of the Virgin Islands v. Bedford \_\_\_, 671 F.2d 758, 762 (3d Cir. 1982) ("The reviewing court must decide whether the error itself had substantial influence [on the minds of the jury.]" (alteration in original) (internal quotations omitted)).

### IV. DISCUSSION

Ortiz argues that the erroneous admission in evidence of G-17, a notebook that contained records of drug transactions, had a substantial impact on the minds of the jury and contributed to his conviction. The Court concludes that the evidence was properly admitted and that there was no miscarriage of justice. The Court will address the issues raised—the relevance issue and the hearsay objections—in turn.

#### A. Relevance—Admissibility of G-17 Under Rules 404(b), 403, 402 and 401

Under Rule 402, “[a]ll relevant evidence is admissible” except as otherwise provided by the Constitution, federal law or the Federal Rules of Evidence. Fed. R. Evid. 402. “[E]vidence is ‘relevant’ if it exists simply because it has some ‘tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’ Fed. R. Evid. 401.” United States v. Murray, 103 F.3d 310, 316 (3d Cir. 1997).

Rule 404(b) restricts the admission of evidence of other crimes or acts. It provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Fed. R. Evid. 404(b).

The government presented evidence that Ortiz was the “owner” of the 3000 block of North Lee Street in Philadelphia—others would pay him “rent” to distribute drugs on the block. Specifically, coconspirators of Ortiz testified that two individuals, Cesar Vasquez, a/k/a “Tico,” (“Vasquez” or “Tico”) and Gustavo Fernandez (“Fernandez” or “Gustavo”) rented the block from Ortiz and prepared and distributed illegal drugs on the block. <sup>2</sup>

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<sup>2</sup>For example, Ippifano Gonzales testified that “Cello[sic] was...the owner of the block; not only for the heroin, but also for the cocaine. He was the one that managed all of them.... Cello[sic] had given the block to Gustavo and Tico for them to sell the drug. They had agreed to pay...arent to Cello[sic].” Tr. at 48–49 (Dec. 7, 1999). Further, Diaz-Baez testified that Tico, one of the members of the conspiracy, had told him that he had a drug corner

According to Diaz-Baez's testimony during the document voir dire, the entries regarding "Chelo," a name used by Ortiz, were made on January 15, 1996.<sup>3</sup> Tr. at 30 (Dec. 9, 1999). Because the entries were made on January 15, 1996, Ortiz argues that the entries were beyond the temporal limits of the conspiracy charged in the Indictment—from "at least December 1996"—and were thus irrelevant and highly prejudicial evidence of crimes not charged. Indictment ¶ 1. As such, Ortiz contends that the admission of the evidence contained in G-17 constituted "other crimes" evidence in violation of Fed. R. Evid. 404(b).<sup>4</sup>

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and "the owner of the corner" s name was Chelo." Tr. at 50 (Dec. 9, 1999) (testimony of Diaz-Baez)

In addition, other witnesses testified as to other aspects of Chelo's involvement with the drug distribution organization. Johanna Guzman testified to holding heroin that Chelo gave her for distribution from her home at 3033 Lee Street, Tr. at 3, 9–10 (Dec. 13, 1999). Carmen Guzman testified that a drug distributor named Jose had informed her that Chelo was the "boss" of the drug business, Tr. at 175 (Dec. 13, 1999); and that Chelo would "usually pass through" the 3000 block of Lee Street, *id.* at 186, where she lived and worked as a "caseworker." *Id.* at 177. On December 7, 1999, Ippifano Gonzalez testified that the drugs she prepared while in the employ of Gustavo and Ticowere distributed on Lee Street, Tr. at 39 (Dec. 7, 1999). See also Tr. at 10, 11, 14, 15, 17, 18, 40, 41, 48–51, 54–56 (Dec. 7, 1999) (testimony of Ippifano Gonzalez); Tr. at 17, 18, 25, 26 (Dec. 9, 1999) (testimony of Antonio Duran); Tr. at 71 (Dec. 9, 1999) (testimony of Diaz-Baez).

<sup>3</sup>The government does not concede that the entries regarding Chelo were made in January 1996; it suggests that some of the references in Exhibit 17 relate to balances in Exhibit 18, which was prepared in mid-1997. See Government's Opp'nto Mot. of Def. Jose Ortiz for a New Trial, at 5. The Court concludes that the only evidence of the date of the Chelo entries was that provided by Diaz-Baez—January 15, 1996.

<sup>4</sup>The government replies to this argument with a discussion of whether a variance occurred between the Indictment and the proof offered at trial. Ortiz does not contend that a variance occurred. Rather, he claims that the evidence relating to drug transactions that occurred in January 1996 was not relevant to the crime charged and that it constituted improper "other crimes" evidence, offered "to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b).

Relying on a recent Third Circuit case, United States v. Akande, 200 F.3d 136, 137 (3d Cir. 1999), Ortiz argues that conduct may not be considered when it falls far outside the “temporal limits” of the conspiracy as charged. In Akande, the Third Circuit addressed the narrow question of how to determine the scope of an order of restitution. See id. at 137. Because restitution may only be ordered pursuant to statutory authorization, which limits permissible restitution to compensate for the harm resulting from the ‘offense of conviction,’ the Akande court examined which criminal acts undertaken in the course of a conspiracy could be properly included as part of the conviction of that crime. Id. at 138–39. The Third Circuit held that dates set forth in an indictment must be strictly construed for restitution purposes and allowed restitution only for crimes committed during the charged period of the conspiracy. Significantly, the court expressly distinguished between challenges to a restitution order under the restitution statute and “attacks on the sufficiency of the evidence or indictment.” Id. at 142. This Court is unwilling to extend the Akande rationale to a case challenging the admissibility of evidence of a conspiracy.

At trial, the Court determined that the evidence contained in the notebook was intrinsic evidence of the conspiracy itself, not ‘other crimes’ evidence. As the Third Circuit has explained, “[w]hen the evidence of another crime is necessary to establish an element of the offense being tried, there is no ‘other crime.’” United States v. Sriyuth, 98 F.3d 739, 747 (3d Cir. 1996) (internal quotation omitted). In this case, the evidence of interaction between Ortiz and the other members of the Diaz-Baez drug organization was relevant to prove the existence of the conspiracy and the defendant’s relationship to the drug distribution organization that provided drugs to the 3000 block of North Lee Street. The entries regarding a purchase of drugs by

“Chelo”(Ortiz)in early 1996 tend to establish that Ortiz was a member of the conspiracy; they were not admitted to show his propensity to commit drug-related crimes. After making the determination of relevancy, the Court concluded at trial pursuant to Rule 403 that the probative value of the evidence outweighed the danger of unfair prejudice. <sup>5</sup>

Assuming arguendo that the notebook entries did not properly constitute intrinsic evidence, under certain circumstances, courts may permit the introduction of other crimes evidence as relevant background information regarding the development and existence of a charged conspiracy. In United States v. Echevarri, 854 F.2d 638, 644 (3d Cir. 1988), for example, the Third Circuit upheld the district court’s admission of evidence relating to the defendant’s purchase of cocaine one year before the start of the conspiracy charged as evidence of preparation to establish a large drug business. In so doing, the Echevarri court ruled that “[i]n order to admit evidence under Rule 404(b), a court must be able to articulate a way in which the tendered evidence logically tends to establish or refute a material fact in issue, and that chain of logic must include no link involving an inference that a bad person is disposed to do bad acts.” Id.

As discussed above, the reference to “Chelo” in G-17 tends to establish the existence of a relationship between members of the conspiracy, a material fact at issue. Thus, the evidence was admissible under 404(b). See Fed. R. Evid. 404(b). Once logical relevance of Rule 404(b) evidence is established, the court must weigh the probative value of the evidence

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<sup>5</sup>The Court stated on the record: “[M]y 403 determination with respect to G-17 is the same as the 403 determination I made at sidebar with respect to G-18.” Tr. at 68 (Dec. 9, 1999). During the earlier sidebar ruling, the Court ruled that the probative value of the evidence in both G-17 and G-18 “outweighs the nature [danger] of untoward [unfair] prejudice.” Id. at 64.

against any potential for unfair prejudice under Rule 403. See Fed. R. Evid. 403. On this issue, the Court determined at trial that the probative value of the evidence outweighed the danger of unfair prejudice when ruling that the evidence was intrinsic and relevant to the proof of the conspiracy.

**B. Hearsay Objections to the Admissibility of G-17**

The Court next turns to defendant's objection that G-17 constitutes inadmissible hearsay evidence. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Hearsay is generally inadmissible, unless an exception to the rule against hearsay is applicable. See Fed. R. Evid. 802. In this case, G-17 was properly admitted either as a coconspirator statement under Rule 801(d)(2)(E) or as a business record under Rule 803(6).

**1. Rule 801(d)(2)(E)**

For hearsay statements to be admissible under Rule 801(d)(2)(E), <sup>6</sup>the district court must find by a preponderance of the evidence "(1) that a conspiracy existed; (2) the declarant and the party against whom the statement is offered were members of the conspiracy; (3) the statement was made in the course of the conspiracy; and (4) the statement was made in furtherance of the conspiracy." United States v. McGlory, 968 F.2d 309, 333 (3d Cir. 1992) (citing Bourjaily v. United States, 483 U.S. 171, 175, 107 S.Ct. 2775, 2778–79, 97 L.Ed.2d 144 (1997)).

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<sup>6</sup>Rule 801(d)(2)(E) provides that "a statement by a coconspirator of a party during the course of and in furtherance of the conspiracy" is not hearsay. Fed. R. Evid. 801(d)(2)(E)



Before allowing the admission of a statement made by a coconspirator, the party seeking to introduce the evidence must establish the existence of a conspiracy by a preponderance of the evidence. See id.; Bourjaily v. United States, 483 U.S. at 175, 107 S.Ct. at 2778. Under Rule 801(d)(2) the “contents of the statements shall be considered but are not alone sufficient to establish... the existence of a conspiracy...” Fed.R.Evid. 801(d)(2). A court may thus consider the contents of the declarant’s statement in determining whether a conspiracy existed. Bourjaily, 483 U.S. at 179–80; 107 S.Ct. at 2780–81.

The government established by physical evidence <sup>7</sup> and the testimony of Diaz-Baez and several coconspirators that he and others were engaged in a conspiracy to distribute drugs. Diaz-Baez testified as to how he supplied heroin to the drug distribution operation. See Tr. at 2–5 (testimony of Diaz-Baez) (Dec. 8, 1999). Others testified as to their work as sellers, “caseworkers,” packagers of drugs, and couriers of drugs and money in the organization that distributed drugs to the 3000 block of North Lee Street. See supra note 2. The Court thus concluded that the government proved the existence of a conspiracy by a preponderance of the evidence.

The Court also found that the statements contained in G-17 were made by a coconspirator. Ortiz argues that the government did not establish the identity of the hearsay declarant and that, as a result, it could not show that the statements were made by a coconspirator. Although there was some conflicting testimony regarding who was responsible

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<sup>7</sup>For example, the government introduced heroin, Tr. at 26 (Dec. 7, 1999); a grinder used in the preparation of drugs, id. at 28; a drug scale, id.; a spoon and mask used in the preparation of heroin, id. at 29; blue bags used for packaging heroin, id.; a stamp used to mark the blue bags in which the drugs were packaged, id.; and a machine used to seal plastic bags during drug packaging, id. at 29–30.

for record keeping generally, <sup>8</sup> on December 9, 1999, Diaz-Baez testified that the records contained in G-17 that implicate Ortiz were prepared by Eusebio Diaz, a/k/a Marino Diaz (“Marino”). In response to the Court’s question as to who had made entries in G-17 under the heading “Chelo Debe,” Diaz-Baez replied: “This is Marino. Because this was a confidential book that only Marino could touch.” Tr. at 30 (Dec. 9, 1999). <sup>9</sup>

Even the government’s failure to establish with certainty which coconspirator made the statements would not require their exclusion. With respect to Rule 801(d)(2)(E), the Third Circuit has stated that a declarant’s “[u]nidentifiability may be important in some situations, but when the statement itself and the surrounding circumstances provide sufficient evidence of reliability, unidentifiability will not be particularly important.” United States v. McGlory, 968 F.2d 309, 335 (3d Cir. 1992) (quoting United States v. Cruz, 910 F.2d 1072, 1081 n.10 (3d Cir. 1990)). Other courts have also concluded that “absolute proof of authorship is not essential to the invocation of the coconspirator exception.” Id. (citing United States v. Hemel,

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<sup>8</sup> On December 8, 1999, when Assistant United States Attorney Gregory A. Paw asked Diaz-Baez who had made the entries in G-17, Diaz-Baez replied: “Well, the book that is here... first it was Marino and then Rafael Cepeda—Gisy Cepeda, she was the girlfriend of Rafael Cepeda. Gisy, her correct last name was Gisy Martinez, she was the girlfriend of Rafael Cepeda.” Tr. at 16 (Dec. 8, 1999).

<sup>9</sup> At trial, counsel for Ortiz objected to the admission of the records Marino created on the ground that Marino was no longer involved in the conspiracy. That Marino left the conspiracy prior to the date charged on the Indictment is not relevant. As a general rule, statements made by conspirators prior to the time other members join the conspiracy are admissible against all members who subsequently join the conspiracy. See United States v. Pungitore, 910 F.2d 1084, 1147 (3d Cir. 1990); U.S. v. Jannotti, 729 F.2d 213, 221 (3d Cir. 1984); see also United States v. United States Gypsum Co., 333 U.S. 364, 393, 68 S.Ct. 525, 92 L.Ed. 746 (1948) ; 5 Weinstein’s Federal Evidence § 801.34, at 801-80 (citing cases).

769F.2d1306,1313(8thCir.1985); UnitedStatesv.DeGudino \_\_\_,722F.2d1351,1356(7thCir. 1983)).

Afterthegovernmentpresentedevidenceoftheexistenceofaconspiracyandthe factthatthenotebookentriesweremadebyacoconspirator,theCourtturnedtothequestionof whetherthenotebookentrieswereproperlyadmittedasstatementsmadeinthecourseofandin furtheranceoftheconspiracy.TheentriesinG-17weremadeduring,andusedtoeffect,drug transactions.Thenotebookcontainedinformationofusetomembersofthedrugconspiracyin keepingtrackoftheirfinancesanddrugdeliveries—informationusedtofurtherthedistribution ofdrugs.Onsimilarfacts,othercourtshavefoundcomparablestatementstobe‘infurtherance’ ofaconspiracywithinthemeaningofRule801(d)(2)(E). See,e.g.,UnitedStatesv.McGlory \_\_\_, 968F.2d309,338(3dCir.1992)(describingrecordsofadrugbusinessas“documentsprepared infurtheranceoftheconspiracy”); seealso,e.g.,UnitedStatesv.Young \_\_\_,39F.3d1561,1571 (11thCir.1994)(findingspiralnotebookscontainingrecordsofdrugtransactionsadmissible underFed.R.Evid.801(d)(2)(E)); UnitedStatesv.Arce \_\_\_,997F.2d1123,1128(5thCir.1993) (concludingthatacoconspirator’sdrugledgerswereadmissibleunderFed.R.Evid. 801(d)(2)(E)); UnitedStatesv.Covos \_\_\_,872F.2d805(8thCir.1988)(same).Inthiscase,asin McGlory,therecordscontainedinG-17weredrugrecordsmadeinthecourseofandin furtheranceoftheconspiracychargedinCountOneoftheIndictmentandwerethusproperly admittedunderRule801(d)(2)(E).

## **2. Rule803(6)**

Rule803(6)oftheFederalRulesofEvidence,thebusinessrecordsexception, permitstheintroductionof:

[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Fed. R. Evid. 803(6). By its very terms, the rule authorizes the parties to offer foundation evidence from a “qualified witness” other than a record custodian. Id. The Third Circuit has construed the term “qualified witness” broadly, holding that “a qualified witness only need ‘have familiarity with the record-keeping system’ and the ability to attest to the foundational requirements of Rule 803(6).” United States v. Console, 13 F.3d 641, 657 (3d Cir. 1993) (quoting United States v. Pellulo, 964 F.2d 193, 201–02 (3d Cir. 1992)). On this rationale, evidence may be admissible when the witness is not an employee of the entity; courts have even found that government agents may lay a proper foundation where the agent is familiar with the record-keeping system. See Pellulo, 964 F.2d at 201 (citing cases); see also 5 Weinstein’s Federal Evidence § 803.11[11], at 803-62 (noting that the qualified witness must have familiarity with the record-keeping system, but that the “witness need not have personal knowledge of the actual creation of the document” (internal quotation omitted)).

In United States v. Furst, the Third Circuit set forth the elements to which a qualified witness must testify as follows:

(1) [that] the declarant in the record had knowledge to make accurate statements; (2) that the declarant recorded the statements contemporaneously with the actions which were the subject of the

reports;(3)thatthedeclarantmadetherecordintheregularcourseof thebusinessactivity;and(4)thatsuchrecordswereregularlykeptby thebusiness.

UnitedStatesv.Furst, 886F.2d558,571(3dCir.1989)(citingFed.R.Evid.R.803(6)).

Inthiscase,thegovernmentofferedthetestimonyofDiaz-Baez,thesupplierof narcoticstothedrugorganizationdescribedintheIndictment,tolaythefoundationRule803(6) requires.Ortizobjectstotheevidenceonthe groundthatDiaz-Baezwasunabletospecifically identifywhomadetherecords. <sup>10</sup>Asdiscussedabove,theCourtfindsthiscontentiontobe withoutmerit.Diaz-Baezidentifiedthreepeoplewhowereresponsibleforrecordkeepingfor thedrugorganization.Seenotes8and10, supra.Furthermore,duringbothhistestimonyinthe presenceofthejuryandthedocumentvoiridireconcerningG-17,Diaz-Baezdemonstratedthat hewaswell-versedintherecord-keepingsystem. <sup>11</sup>

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<sup>10</sup>OrtizclaimsthatDiaz-Baeztestifiedthatoneoffivepeoplecouldhavemadethe notebookentries.Basedontherecord,theCourtconcludesthatthispositionisunfounded. DuringthefirstdayofDiaz-Baez's testimony,hestatedthathreepeoplewereresponsiblefor recordkeeping.Tr.at16.Atfirst,therecordswerekeptby"Marino";theyweresubsequently keptbyRafaelCepedaandGisyMartinez. Id.Byidentifyingtheindividualswhowere responsibleforrecordkeepingandbasedonDiaz-Baez'spersonal familiaritywiththerecord- keepingsystem,thiscaseisclearlydistinguishablefrom UnitedStatesv.Ordonez, 722F.2d530 (9thCir.1983)(finding inadmissibleadrugledgerenteredintoevidencethroughthetestimony ofagovernmentexpert).InOrtiz'scase,thegovernmentintroducedevidenceofwhomadethe notebookentries;thesourceoftherecordkeeper'spersonal knowledge;thetimingofrecording entries;andtheorganization'spracticeofkeepingrecordsofdrugtransactions.

<sup>11</sup>Diaz-Baezansweredquestionsatthedocumentvoiridirerelatingtothefoundational elementsofRule803(6)asfollows:

Q DidyoutalkwithMarinoaboutanywaythatyoushouldrecordpaymentsmade?  
A Yes,theentiretime.  
Q Whatdidyoutalktohimabout?  
A Tokeeparecordofeverypersonwhowouldsell,thathewouldreceivemoney from.Theaccountinghadtobeveryexact.Thataccounts[sic]hewouldpassto mehowmuchhewouldstilloweme,howmucheachcustomerofhisowedme.  
...

Diaz-Baez's testified as to the organization's record-keeping practices and that Marin had made the entry in G-17 implicating Ortiz; <sup>12</sup>the Court concluded at trial that the government presented evidence that (1) Marin had personal knowledge regarding the drug transactions with "Chelo" that were recorded in the notebook; (2) Marin recorded the entries at or near the time the transaction occurred; (3) Marin made the records during the regular course of business; and (4) Marin regularly kept such records in his capacity as Diaz-Baez's employee. The Court thus found at trial that the government established all of the criteria for admissibility of business records. See Furst, 886 F.2d at 571. The Court remains of that opinion.

It is Ortiz's position that the notebook entries were tainted by a "lack of trustworthiness" and should have been excluded on this ground. See Fed. R. Evid. 803(6). Specifically, Ortiz argues that the lack of trustworthiness was demonstrated by Diaz-Baez's statements regarding an "accuracy problem" and Diaz-Baez's testimony that "his brother's name mistakenly appeared in the drug records." Def.'s Mot. to Dismiss at 20. As the Third Circuit explained in United States v. Console, "Rule 803(6) does not require that the person transmitting the recorded information be under a business duty to provide accurate information." 13 F.3d 641, 657 (3d Cir. 1993) (internal quotation omitted). "Instead, it is sufficient if it is shown that...

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Q What would you tell him with respect to writing information down?

A If he would receive one kilo of heroin he would write down the amount received, and the same way they were paid he would have to start deducting.

Q What specific direction did you give him about, if any, with regard to when he should make those records?

A At the same time that he would receive it.

Q Now how would he know that money was received?

A Because he would pay for the drugs. He would sell the drugs, also.

Tr. at 20–21 (Dec. 9, 1999).

<sup>12</sup> See supra text accompanying note 9.

[the] standard practice was to verify the information provided....” Id. at 658 (modification in original) (internal quotation omitted). In his testimony, Diaz-Baez demonstrated that Marino had a standard practice of personally verifying the information recorded as he purchased and sold drugs for the organization. See, e.g., Tr. at 14 (Dec. 8, 1999) and Tr. at 8 (Dec. 9, 1999).

The government met its burden in establishing the four foundational requirements for the admission of evidence under Rule 803(6). Thus, the Court concludes that the statements in G-17 regarding Ortiz were properly admissible as a business record.

### **C. Harmless Error Analysis**

As set forth in Government of the Virgin Islands v. Bedford, “[u]nless ‘there is a reasonable possibility that [the error] contributed to the conviction, reversal is not required.’” 671 F.2d 758, 762 (3d Cir. 1982) (quoting Schneble v. Florida, 405 U.S. 427, 432 (1972)). Error is “harmless if it is highly probable that the error did not contribute to the judgment.” U.S. v. Saada, 212 F.3d 210, 222 (3d Cir. 2000) (internal quotations omitted). This standard is met “when the court possesses a ‘sure conviction’ that the error did not prejudice the defendant.” Id.

In its case against Ortiz, the government offered substantial evidence of the existence of a conspiracy, and Ortiz’s membership in it, including physical evidence and no less than five witnesses who offered testimony linking him to the conspiracy. See notes 2 and 7, supra. In light of all the evidence presented at trial, the Court concludes that even if the statements in G-17 were introduced in error, the error was harmless.

## **V. CONCLUSION**

For the foregoing reasons, the Court will deny Defendant Jose Ortiz's Motion for a New Trial.

An appropriate order follows.



**INTHEUNITEDSTATESDISTRICTCOURT  
FORTHEEASTERNDISTRICTOFPENNSYLVANIA**

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**UNITEDSTATESOFAMERICA**

**v.**

**JOSEORTIZ**

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**CRIMINALACTION**

**No.99-256**

**ORDER**

**ANDNOW** ,towit,this26thdayofOctober,2000,uponconsiderationof  
DefendantJoseOrtiz'sMotionforNewTrial(DocumentNo.150,filedFeb.22,2000),  
Government'sOppositiontoMotionofDefendantJoseOrtizforaNewTrial(DocumentNo.  
161,filedMar.16,2000),andforthereasonssetforthintheaccompanyingMemorandum, **ITIS**  
**ORDERED**thatDefendantJoseOrtiz'sMotionforNewTrialis **DENIED**.

**BYTHECOURT:**

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**JANE.DUBOIS,J.**